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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Damian Dudley,) No. CV 08-2168-PHX-SMM (LOA)
10 Plaintiff,) **ORDER**
11 vs.)
12 Maricopa County, et al.,)
13 Defendants.)
14 _____)

15 Plaintiff Damian Dudley, who is confined in the Towers Jail in Phoenix, Arizona, has
16 filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to
17 Proceed *In Forma Pauperis*. (Doc.# 1, 3.) Plaintiff's Complaint will be dismissed without
18 leave to amend.

19 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. Id. § 1915(b)(1). The Court
22 will not assess an initial partial filing fee. Id. § 1915(b)(1). The statutory fee will be
23 collected monthly in payments of 20% of the previous month's income each time the amount
24 in the account exceeds \$10.00. Id. § 1915(b)(2). The Court will enter a separate Order
25 requiring the appropriate government agency to collect and forward the fees according to the
26 statutory formula.

27 **II. Statutory Screening of Prisoner Complaints**

28 The Court is required to screen complaints brought by prisoners seeking relief against

1 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
 2 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
 3 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
 4 be granted, or that seek monetary relief from a defendant who is immune from such relief.
 5 Id. § 1915A(b)(1),(2). If the Court determines that a pleading could be cured by the
 6 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
 7 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
 8 (*en banc*). Plaintiff's Complaint will be dismissed without leave to amend because the
 9 Complaint cannot be amended to state a claim.

10 **III. Complaint**

11 Plaintiff alleges three counts for denial of a preliminary hearing, denial of access to
 12 the courts, and violation of due process. Plaintiff sues Maricopa County; Maricopa County
 13 Sheriff Joe Arpaio; Maricopa County Attorney Andrew Thomas; Deputy County Attorney
 14 Cynthia Gialketsis; Superior Court Judge John Doe; and Phoenix Police Officers David
 15 Tucek and Toby Dunn. Plaintiff seeks compensatory, punitive, and declaratory relief.

16 Plaintiff alleges the following facts except as otherwise indicated: On May 2, 2007,
 17 officers Tucek and Dunn arrested Plaintiff, without a warrant, for kidnapping, robbery, and
 18 aggravated assault and booked him into the Fourth Avenue Jail. On May 3, 2007, Plaintiff
 19 was taken before Superior Court Commissioner Sheila Madden for an initial appearance and
 20 a preliminary hearing was set for May 11. The County Attorney filed a motion to continue
 21 the preliminary hearing and a Superior Court Commissioner granted a continuance until May
 22 14, 2007.¹ On May 14, 2007, Plaintiff was indicted by a grand jury. The same day, Deputy
 23 County Attorney Gialketsis filed a notice to vacate the preliminary hearing based on the
 24 indictment, which was granted.² Plaintiff was arraigned on May 23, 2007.³ On April 10,

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 26 ¹ See <http://www.courtminutes.maricopa.gov/docs/Criminal/052007/m2674336.pdf>.

27 ² See <http://www.courtminutes.maricopa.gov/docs/Criminal/052007/m2679285.pdf>.

28 ³ See <http://www.courtminutes.maricopa.gov/docs/Criminal/052007/m2692600.pdf>.

1 2008, Plaintiff was convicted by a jury of robbery, kidnapping, and aggravated assault.⁴
 2 Plaintiff is currently scheduled to be sentenced on January 13, 2009.⁵ Plaintiff contends that
 3 the County Attorney's motion to continue the preliminary hearing, the court's granting of the
 4 continuance, the Deputy County Attorney's notice to vacate the continued preliminary
 5 hearing, and the court's vacatur of the preliminary hearing violated his Fourth, First, and
 6 Fourteenth Amendment rights.

7 **IV. Failure to State a Claim**

8 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
 9 conduct about which he complains was committed by a person acting under the color of state
 10 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
 11 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989) (citing Rinker v. County of Napa, 831 F.2d 829,
 12 831 (9th Cir. 1987)). In addition, a plaintiff must allege that he suffered a specific injury as
 13 a result of the conduct of a particular defendant and he must allege an affirmative link
 14 between the injury and the conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72,
 15 377 (1976).

16 **A. Sheriff Arpaio**

17 Although Arpaio may properly be sued for constitutional violations, Plaintiff fails to
 18 state a claim against him. "A plaintiff must allege facts, not simply conclusions, that show
 19 that an individual was personally involved in the deprivation of his civil rights." Barren v.
 20 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual to be liable in his official
 21 capacity, a plaintiff must allege that the official acted as a result of a policy, practice, or
 22 custom. See Cortez v. County of Los Angeles., 294 F.3d 1186, 1188 (9th Cir. 2002).
 23 Further, there is no *respondeat superior* liability under § 1983, so a defendant's position as
 24 the supervisor of someone who allegedly violated a plaintiff's constitutional rights does not
 25 make him liable. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); Taylor v. List,

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 27 ⁴ See <http://www.courtminutes.maricopa.gov/docs/Criminal/042008/m3145715.pdf>.
 28 ⁵ See <http://www.courtminutes.maricopa.gov/docs/Criminal/122008/m3476667.pdf>.

1 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his individual capacity, “is only liable
 2 for constitutional violations of his subordinates if the supervisor participated in or directed
 3 the violations, or knew of the violations and failed to act to prevent them.” Taylor, 880 F.2d
 4 at 1045.

5 Plaintiff fails to allege any facts against Sheriff Arpaio. Plaintiff has not alleged that
 6 Arpaio enacted or enforced a policy, custom, or practice that resulted in the denial of
 7 Plaintiff’s constitutional rights. Further, Plaintiff has not alleged that Arpaio directly violated
 8 his constitutional rights or that he was aware that Plaintiff’s rights were being violated but
 9 failed to act. Thus, Plaintiff fails to state a claim against Arpaio in his Complaint.

10 **B. Andrew Thomas and Cynthia Gialketsis**

11 Plaintiff sues Maricopa County Attorney Thomas and Deputy County Attorney
 12 Gialketsis for seeking a continuance of the preliminary hearing and then filing a notice to
 13 vacate the preliminary hearing after he was indicted by a grand jury. Both Defendants are
 14 entitled to absolute prosecutorial immunity for these acts. Prosecutors are absolutely immune
 15 from liability under § 1983 for their conduct in “initiating a prosecution and in presenting the
 16 State’s case” insofar as that conduct is “intimately associated with the judicial phase of the
 17 criminal process.” Buckley v. Fitzsimmons, 509 U.S. 259, 270 (1993) (citing Imbler v.
 18 Pachtman, 424 U.S. 409, 430 (1976)); Burns v. Reed, 500 U.S. 478, 486 (1991) (quoting
 19 Imbler, 424 U.S. at 430-431); Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (citing
 20 Imbler, 424 U.S. at 427). Immunity extends to a prosecutor “eliciting false or defamatory
 21 testimony from witnesses or for making false or defamatory statements during, and related
 22 to, judicial proceedings.” Buckley, 509 U.S. 259, 270 (1993) (citations omitted). Plaintiff’s
 23 allegations solely concern conduct in connection with a prosecution and, therefore, these
 24 Defendants are entitled to immunity.

25 **C. Superior Court Judge John Doe**

26 Plaintiff sues Superior Court Judge John Doe for granting the prosecution’s motion
 27 to continue the preliminary hearing and for vacating the preliminary hearing based on
 28 issuance of an indictment. Judges are absolutely immune from damages for all judicial acts

1 performed within their subject matter jurisdiction, “even when such acts are in excess of their
 2 jurisdiction, and are alleged to have been done maliciously or corruptly.” Stump v.
 3 Sparkman, 435 U.S. 349, 356 (1978) (citation omitted); Sadoski v. Mosley, 435 F.3d 1076,
 4 1079 (9th Cir.), cert. denied, 126 S.Ct. 2864 (2006); Harvey v. Waldron, 210 F.3d 1008,
 5 1012 (9th Cir. 2000). An act is “judicial” when it is a function normally performed by a
 6 judge and the parties dealt with the judge in the judge’s judicial capacity. Stump, 435 U.S.
 7 at 362; Crooks v. Maynard, 913 F.2d 699, 700 (9th Cir. 1990) (citing Stump, 435 U.S. at
 8 362). Such immunity also “extends to actions for declaratory, injunctive and other equitable
 9 relief.” Mullis v. Bankr. Court for the Dist. of Nev., 828 F.2d 1385, 1394 (9th Cir. 1987).
 10 Cf. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984) (state officials have judicial or quasi-
 11 judicial immunity from damages only).

12 Plaintiff only sues the fictitiously-named Superior Court judge for acts taken in the
 13 judge’s judicial capacity. Even if properly named, such Defendant is entitled to absolute
 14 judicial immunity for those acts. For these reasons, Plaintiff fails to state a claim against
 15 Superior Court Judge Doe.

16 **D. Tucek and Dunn**

17 Plaintiff sues Phoenix Police Officers Tucek and Dunn. Plaintiff alleges in Count I
 18 that they arrested him without a warrant.⁶ The failure to state a claim includes a claim to
 19 which the abstention doctrine applies. See Yahoo! Inc. v. La Ligue Contre Le Racisme Et
 20 L’Antisemitisme, 433 F.3d 1199, 1224 (9th Cir.), cert denied, 126 S. Ct. 2332 (2006); Smith
 21 v. Cent. Ariz. Water Conservation Dist., 418 F.3d 1028, 1030 (9th Cir. 2005). The
 22 abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971), prevents a federal
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24 ⁶ Under the Fourth Amendment, a warrantless arrest requires probable cause. See
 25 Michigan v. Summers, 452 U.S. 692, 700 (1981). Probable cause to arrest exists when
 26 officers have knowledge or reasonably trustworthy information sufficient to lead a person
 27 of reasonable caution to believe that an offense has been or is being committed by the person
 28 being arrested. Beck v. Ohio, 379 U.S. 89, 91 (1964) (citations omitted). Plaintiff fails to
 allege any facts to support that these Defendants lacked probable cause to believe that he
 committed the offenses for which he was arrested, but even if he had, the abstention doctrine
 applies.

1 court in most circumstances from directly interfering with ongoing criminal proceedings in
 2 state court. The Younger abstention doctrine also bars requests for declaratory and monetary
 3 relief for constitutional injuries arising out of a plaintiff's ongoing state criminal prosecution.
 4 Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986). In addition, the Younger abstention
 5 doctrine applies while a case works its way through the state appellate process, if a prisoner
 6 is convicted. New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350,
 7 369 (1989).

8 As noted above, Plaintiff has been convicted but has not yet been sentenced. There
 9 is no reason Plaintiff cannot present his claims against Tucek and Dunn in the criminal
 10 proceedings or in appeals therefrom, and disruption by a federal court is not required.
 11 Plaintiff's claims against Tucek and Dunn will be dismissed pursuant to the abstention
 12 doctrine.

13 **E. Count I**

14 In Count I, Plaintiff alleges that his Fourth Amendment rights were violated by the
 15 County Attorney's motion to continue the preliminary hearing, the court's granting of the
 16 continuance, the County Attorney's notice to vacate the continued preliminary hearing, and
 17 the court's vacatur of the preliminary hearing because Plaintiff was not afforded a prompt
 18 determination of probable cause for his arrest. Under the Fourth Amendment, there must be
 19 a reasonably prompt judicial determination of probable cause following a warrantless arrest
 20 "as a prerequisite to extended restraint on liberty following arrest." Gerstein v. Pugh, 420
 21 U.S. 103, 114 (1975). A probable cause determination pursuant to Gerstein must be made
 22 by a neutral magistrate, but an adversary hearing is not required.⁷ Id. A Gerstein probable

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 24 ⁷ The standard for probable cause to arrest are "facts and circumstances 'sufficient
 25 to warrant a prudent man in believing that the (suspect) had committed or was committing
 26 an offense.'" Id. at 111-12 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). The
 27 Constitution does not, however, require a preliminary hearing if an indictment has been
 28 returned by the grand jury. Id. at 119 ("[W]e do not imply that the accused is entitled to
 judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's
 prior holding that a judicial hearing is not prerequisite to prosecution by information. ... Lem
 Woon v. Oregon[, 229 U.S. 586, 589-90 (1913)]")."

1 cause hearing conducted within 48 hours of arrest is considered presumptively reasonably
 2 prompt for purposes of the Fourth Amendment. County of Riverside v. McLaughlin, 500
 3 U.S. 44, 56 (1991); see also Powell v. Nevada, 511 U.S. 79, 80 (1994); Brass v. County of
 4 Los Angeles, 328 F.3d 1192, 1201-1202 (9th Cir. 2003).

5 In this case, Plaintiff alleges that he appeared before a magistrate for his initial
 6 appearance within 48 hours of his warrantless arrest.⁸ Plaintiff fails to state a claim for
 7 violation of his Fourth Amendment rights because a magistrate made a reasonably prompt
 8 determination of probable cause for his arrest. Plaintiff was not otherwise entitled to a
 9 preliminary hearing under the Fourth Amendment, or for that matter under the due process
 10 clause of the Fourteenth Amendment, where he was indicted by a grand jury.⁹ Plaintiff
 11 therefore fails to state a claim in Count I. Further, even if Plaintiff had stated a claim, the
 12 claim would be subject to dismissal pursuant to the abstention doctrine as discussed above.

13 **F. Count II**

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 15 ⁸ In Gerstein, the Supreme Court:

16 noted that a state could use a preliminary hearing to fulfill [the] Fourth
 17 Amendment prerequisite [for a probable cause determination for a warrantless
 18 arrest], but to do so, the preliminary hearing would have to be held promptly.
 19 In Riverside County v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d
 20 49 (1991), the Court held that “promptly” for this purpose did not extend
 21 beyond 48 hours (barring exceptional circumstances). Since preliminary
 22 hearings cannot be held so promptly, the states have not used preliminary
 23 hearings to satisfy the Gerstein requirements. Even in jurisdictions in which
 24 preliminary hearings are regularly held, the magistrate will make a separate
 25 Gerstein determination of probable cause, usually at or just before the first
 26 appearance

27 4 Wayne R. LaFave, et al., Criminal Procedure, § 14.2(a), n. 5 (3d ed. 2008).

28 ⁹ As recently explained by the Arizona Court of Appeals, “The purpose of a
 29 preliminary hearing is to determine whether the prosecution’s case establishes probable
 30 cause” for a *prosecution*. Segura v. Cunanan, — P.3d —, 2008 WL 1822308 at * 5 (Ariz.
 31 App. Apr. 24, 2008). Alternatively, the prosecution may establish probable cause for a
 32 *prosecution* by obtaining a grand jury indictment. Id. Indeed, “[a] supervening indictment
 33 eliminates a defendant’s right to a preliminary hearing on a prior complaint.” Id.

1 In Count II, Plaintiff alleges that his First Amendment right of access to the courts was
2 violated by the County Attorney's notice to vacate the preliminary hearing and the court's
3 vacatur of the preliminary hearing, after Plaintiff was indicted, because he was denied a
4 preliminary hearing prior to his indictment. The right of meaningful access to the courts
5 prohibits state officials from actively interfering with an inmate's attempt to prepare or file
6 legal documents. Lewis v. Casey, 518 U.S. 343, 350 (1996). That right, however, only
7 encompasses the ability to bring petitions or complaints to federal court and not to discover
8 or even effectively litigate such claims once filed with a court. Id. at 354; see also Cornett
9 v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) ("The right of access is designed to ensure that
10 a habeas petition or civil rights complaint of a person in state custody will reach a court for
11 consideration.") The right "guarantees no particular methodology but rather the conferral
12 of a capability — the capability of bringing contemplated challenges to sentences or
13 conditions of confinement before the courts." Lewis, 518 U.S. at 356. Further, the denial
14 of access to a paralegal or use of a law library is not actionable if there is no claim of
15 prejudice to an existing or future legal action. Id. at 351-53. That is, an inmate must
16 establish that he suffered an "actual injury" when he alleges that he was denied access to a
17 paralegal or a law library. See Vandelft v. Moses, 31 F.3d 794, 797 (9th Cir. 1994). An
18 "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such
19 as the inability to meet a filing deadline or to present a claim." Lewis, 518 U.S. at 348. In
20 other words, a plaintiff must allege facts to support that a defendant's conduct prevented him
21 from bringing to court a non-frivolous claim that he wished to present. Id. at 351-53. With
22 respect to access to the courts in criminal proceedings, the appointment of counsel satisfies
23 the obligation of access to the courts. See United States v. Wilson, 690 F.2d 1267, 1272 (9th
24 Cir. 1982) ("The offer of court-appointed counsel to represent [a defendant] satisfied the
25 Fifth Amendment obligation to provide meaningful access to the courts.").

26 Plaintiff acknowledges in his Complaint that he was represented by counsel in his
27 criminal proceedings. Moreover, as discussed above, Plaintiff does not have a constitutional
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1 right to a preliminary hearing,¹⁰ and thus, Plaintiff fails to allege an “actual injury.” Further,
 2 even if Plaintiff could state a claim for denial of access to the courts because a preliminary
 3 hearing was vacated, the claim would be subject to dismissal pursuant to the abstention
 4 doctrine. For these reasons, Count II will be dismissed for failure to state a claim.

5 **C. Count III**

6 In Count III, Plaintiff contends that the Arizona Constitution guarantees him a
 7 preliminary hearing and that the County Attorney’s notice to vacate the preliminary hearing
 8 and the court’s vacatur of the preliminary hearing violated his due process rights. This Count
 9 also fails to state a claim.

10 As discussed above, a preliminary hearing is not required under federal law. Plaintiff
 11 therefore fails to state a claim under § 1983 in Count III. Moreover, the Arizona Constitution
 12 provides in relevant part that, “No person shall be prosecuted criminally in any court of
 13 record for felony or misdemeanor, otherwise than by information *or* indictment; no person
 14 shall be prosecuted for felony *by information* without having had a preliminary examination
 15 before a magistrate or having waived such preliminary examination.” Ariz. Const. ¶10, Art.
 16 2, § 30 (emphasis added). Thus, the state constitution only confers a right to a preliminary
 17 hearing if a defendant is prosecuted by information. Plaintiff was prosecuted by indictment,
 18 not an information. Further, “[a] supervening indictment eliminates a defendant’s right to
 19 a preliminary hearing on a prior complaint.” Segura, 2008 WL 1822308 at * 5. Count III
 20 will be dismissed for failure to state a claim.

21 **CONCLUSION**

22 For the reasons discussed, Plaintiff fails to state a federal constitutional claim for relief
 23 in his Complaint. Because the allegation of additional facts cannot cure the deficiencies cited
 24 herein, Plaintiff’s Complaint and this action will be dismissed without leave to amend.

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 26 **IT IS ORDERED:**

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 28 ¹⁰ 4 Wayne R. LaFave, et al., Criminal Procedure, § 14.2(a) (3d ed. 2008).

1 (1) Plaintiff's Application to Proceed *In Forma Pauperis*, filed with the Complaint,
2 is **GRANTED**. (Doc.# 3.)

3 (2) As required by the accompanying Order to the appropriate government agency,
4 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

5 (3) The Complaint is **DISMISSED** for failure to state a claim without leave to
6 amend. (Doc.# 1.)

(4) The Clerk of Court must enter a judgment of dismissal of this action with prejudice that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

9 DATED this 5th day of January, 2009.

Stephen M. McNamara
Stephen M. McNamara

Stephen M. McNamee
United States District Judge